IN THE

Supreme Court of the United States,

OCTOBER TERM, 1903.

MARC HUBBERT, - - - - - - - *Petitioner*,

No. 31. *VERSUS*

CAMPBELLSVILLE LUMBER COMPANY, *Defendant*.

Reply to Defendant's Brief.

The undersigned in his original brief for petitioner discussed in their order the five questions raised by the affidavit filed in support of the motion to set aside the judgment of the Circuit Court. Defendant's counsel in his brief has expanded these five questions to twelve in number, and it is thought best to answer them in the order of his brief, referring to our former brief when necessary to avoid repetition.

I.

It is argued that the judgment of the court was void because the Commissioner reported and the court found that it would be necessary to levy a tax of $14,180.77 in order to raise $3,500.

The Act of February 27, 1882, under which the judgment was rendered, required the court to make "due allowance for probable delinquencies" (Sec. 3), and provided that "if the amount collected shall be more than necessary to pay the judgment and costs, the residue shall be paid over to the Commissioner of the Sinking Fund of said county, to be used for

the payment of the principal and interest of bonds issued under the Act to which this is an amendment."

A glance at the Commissioner's report will show that the majority of the assessments were for sums less than $5.00. The difficulty of levying and collecting executions for such small amounts from the population of an entire county is apparent, and the "probable delinquencies," especially among the small taxpayers, will necessarily be large. When we add to this the large expense of sending an army of deputy marshals into a county whose citizens are resisting a tax with such unanimity as to prevent the qualification of a sheriff (Rec. 71), it must be evident that the allowance made by the court for probable delinquencies and costs was not excessive. An exception to the report on this ground was made by the county, and was overruled. (Rec. 16–19.) This action of the court, even if erroneous, did not make the judgment void.

II.

That the judgment was void because the sums adjudged against the taxpayers were unequal. (Brief for respondent, p 6.)

The brief leaves the impression that the same rate of tax was not assessed on all the taxpayers, and charges that "it was designed to impose excessive levies in order that a few leading property-owners might be compelled to pay the entire debt." (P. 8.)

The mode in which the Commissioner made up his report is thus stated by him :

> "I have examined the last assessment of Taylor County as is shown by the Assessor's books in the office of the County Court Clerk, and find that it will be necessary to collect $1.40 on the $100 of the taxable property as shown by the said assessment to pay the judgment, interest, and cost in this action.

"This estimate is made after making due allowance for delinquencies, which will necessarily be larger than usual by reason of the opposition of the people to the payment of the bonded debt and the difficulty of finding the personal property." (Rec. 72.)

An examination of the assessment reported (Rec. 22 to 62) will show that this rate was accurately assessed to each and every taxpayer.

The only basis of fact left for the charge under consideration is that too much allowance was made for probable delinquencies and costs, a contention which has just been discussed.

III.

That more than "due allowance" for delinquencies was made. (Respondent's Brief, p. 9.)

This is a repetition of the two previous Assignments of Error.

IV.

That the notice published by the Commissioner of the filing of his report was insufficient. Two contentions are made under this head:

1. That the notice did not conform to the statute. The section of the Act in question reads as follows:

"SEC. 5. Upon the completion of said report, the said Commissioner shall file the same in the clerk's office of said court, and publish in a newspaper published in Taylor or Marion county, once each week for three weeks, a notice of the filing of said report, and stating that the same will be subject to exceptions, to be filed in said clerk's office until a day to be mentioned in said notice, which day shall not be less than thirty nor more than forty days from the last day on which the said notice is to be published."

The Commissioner's notice read as follows:

"NOTICE.

"Notice is hereby given that I have filed in court my report in the above case, showing the amount which it will be necessary for each of the taxpayers of Taylor County to pay, in order to pay off the judgment herein and that said report is subject to exceptions to be filed in the clerk's office until January 7th, 1901.

"DAVID L. MAY,
"Special Commissioner.

"Nov. 16–3t."

Counsel seems to argue that the Commissioner should have inserted in his notice after the word "judgment" the words "making due allowance for probable delinquencies." It is a sufficient answer to this to point out the fact that the statute does not require the contents of the report to be stated, but only "a notice of the filing of said report." Any description which would identify the report to a common intent will satisfy the statute.

2. That the report was not published in the newspaper required by the Act. (Respondent's brief, p. 12.)

The Act requires publication "in a newspaper published in Taylor or Marion county," and the publication was made in a paper published in Marion County.

The Act was complied with, but the insinuation in the brief that the Marion County paper was selected "with the expectation, or hope, that his notice would not be seen" (p. 12), demands an answer.

The largest center of population in Taylor County is Campbellsville, a village having a population of 1,341 by the last census. The writer of this brief, who directed the publication, did not then know, and does not now know, whether there was, or is, any newspaper published in Campbellsville.

Marion County adjoins Taylor, and Lebanon, its county seat, is a considerable town, having a population of 3,043, and a well-known newspaper, the "Lebanon Enterprise."

There was also another reason for the selection. The hostility of the people of Taylor County to the payment of the tax would probably have prevented the county paper from assisting in its collection, and this hostility evidently affected the "Lebanon Enterprise," though published in a different county, as is shown by the unusual difficulty the Commissioner had in getting the notice published. His first notice was prepaid, and directed to be inserted in three issues. It was inserted in one, but omitted in the other two. For this the editor apologized and promised to re-insert. This time two insertions were made and the third omitted. Sharp complaints were made to the editor, and the matter reported to the court, and then on the third trial the publication was made. (Rec. 14–17–18.)

Counsel feels warranted in saying that the delay and difficulty of publishing the notice in a newspaper published in Taylor County, if there was such a paper, would have been much greater.

V.

That the bonds did not contain the stipulation required by Section 10 of the Amended Act.

For this, see Brief for Petitioner, page 6.

VI.

This point is so vaguely stated as to be almost wholly elusive.

To the best judgment of the present writer, it is that the bonds recited that they were issued under the original Act of 1878, and that, therefore, the holder is not entitled to the remedies provided by the Amended Act of 1882.

It is a sufficient answer to this contention to call the court's attention to the fact that the Amended Act provides,

> "Sec. 2. That in the event judgment shall be rendered on any bond or bonds which may be issued by the

county of Taylor *under the provisions of the act to which this is an amendment*, or on any coupons of any such bond or bonds, such judgments shall constitute a lien upon all real and personal property in said county, subject to taxation under the revenue laws of this Commonwealth."

It will be seen from this that the Amended Act applies, and applies only, to bonds issued under the original Act.

VII.

That the Act of 1882 was repealed by the Kentucky Constitution of 1891, and statutes enacted thereunder.

To this we reply:

1. The remedy provided by the Act was a part of the contract, and could not be repealed by the State until the bonds were paid.

Seibert v. Lewis, 122 U. S. 284;
Seibert v. U. S., 129 U. S. 192.

It may be argued that if "a substantial and efficacious remedy" exists under the repealing act, or under the ordinary laws of the State, then under the principles recently laid down in Oshkosh v. Oshkosh, 187 U. S. 437, the repeal is valid.

Our answer to this is that the ordinary remedies are plainly inadequate, as is shown by the fact that the holders of the first set of bonds, who had only those remedies, settled at fifty cents on the dollar, while the second set of bondholders, who had, or thought they had, the new remedies, gave par for their bonds.

2. There has been no repeal of the Act of 1882. Counsel for respondent argues that the repeal is made by Section 59, relating to special and local acts, and by the Schedule of the Constitution of Kentucky of 1891, and seeks to prove it by quoting Section 1 of the Schedule and omitting its most material clause.

The section of the Schedule, with the omission supplied and italicized, reads as follows:

> "1. That all laws of this Commonwealth in force at the time of the adoption of this Constitution, not inconsistent therewith, shall remain in full force until altered or repealed by the General Assembly; *and all rights, actions, prosecutions, claims and contracts of the State, counties, individuals or bodies corporate, not inconsistent therewith, shall continue as valid as if this Constitution had not been adopted.* The provisions of all laws which are inconsistent with this Constitution shall cease upon its adoption, except that all laws which are inconsistent with such provisions as require legislation to enforce them shall remain in force until such legislation is had, but not longer than six years after the adoption of this Constitution, unless sooner amended or repealed by the General Assembly."

Shortly after the adoption of the Constitution the contention arose that the charters of cities, and especially rights given them to collect taxes by suit, being special or local acts, were repealed. To this contention the Kentucky court has answered that Section 59, which is the section prohibiting special legislation, is prospective only in its operation, and that the schedule saves from repeal all statutes giving a right of action to recover taxes. On this last topic we quote from the opinion:

> "When by the first provision of this schedule we read that *all rights, all actions*, and all *claims* shall continue and remain as valid as if this constitution had never been adopted, we think these words used might be applied to the right of the city to collect taxes past due and unpaid. And when it says that all *actions* are *preserved*, it embraces and includes actions for the recovery of taxes then authorized to be filed and pending in the Louisville Chancery Court, as well as any and every other action." (Long v. City of Louisville, 97 Ky. 376.)

In a later case, reported in the same volume, it is held that a local act authorizing a county to buy turnpikes was not repealed. (O'Mahoney v. Bullock, 97 Ky. 774.)

Again, in reviewing the provisions of Sections 59, 171 and 181, relied on as repealing a local statute relating to turnpikes, the court said :

> "These provisions look altogether to future legislation, and manifestly do not affect, directly or indirectly, the laws already in force. The existing special legislation on the subjects named in the various subsections of Section 59, with respect to which special acts are now prohibited, does not stand repealed by the mere force of such prohibitions. The General Assembly may repeal any of these special acts by a special act for that purpose, or by substitution of comprehensive general laws, or, with respect to such of them as may be inconsistent with those provisions of the Constitution which require legislation to enforce them, by the enactment of laws effectuating such constitutional provisions. Such special acts as are inconsistent with those provisions of the Constitution which do not require legislation to enforce them stand repealed." (Pearce v. Mason County, 99 Ky. 364.)

Again, in a case involving the right of a municipality to collect taxes by suit under a special or local statute, the court elaborately examines and reaffirms its previous rulings. (Covington v. Highlands, 24 Ky. Law Rep. 433.)

It is also contended by respondent that Sections 1839–1840 of the Kentucky Statutes, providing for levying taxes for county purposes, work an implied repeal of the Act of 1882. To avoid such repeals the legislature enacted the following sections of the same compilation :

> "No new law shall be construed to repeal a former law, as to any offense committed against the former law, nor as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever, to affect any such offense or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. If any penalty, forfeiture, or

punishment be mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. (Ky. Stats., Sec. 465.)

"All laws and parts of laws which authorize any county or subdivision thereof, or any city or town or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to any corporation, association or individual, except for the purpose of constructing or maintaining bridges, turnpike roads or gravel roads, are hereby repealed. But nothing in this act contained shall in any wise affect subscriptions to stock, the obtaining or appropriating of money, or loaning of credit, that may have been made or done before the passage of this act." (Ky. Statutes, Sec. 907.)

VIII.

On the principle of *omne ignotum pro magnifico* this is respondent's strongest point. It is omitted in his brief.

IX.

That the judgment of the Circuit Court is void for want of personal service of process.

This is another way of stating the proposition that the Act of 1882 does not provide for due process of law. Section 7 of the Act provides that upon the confirmation of the report, judgment shall be rendered against the taxpayer and that upon this judgment execution shall issue "which may be levied on any property subject to the State revenue tax held by the defendants respectively."

This is in strict conformity to the ordinary mode of collecting taxes in Kentucky, except that the paper held by the collecting officers is in one case called an execution and in the other a tax-bill. If the execution may be levied on all prop-

erty, real and personal, which is subject to the tax, so may the tax-bill, as is shown by the following sections of the statute:

> "The sheriff, from and after the first day of March in each year, shall collect the taxes due in his county, and upon failure by the person bound therefor to pay the same, may distrain the goods and chattels owned by or in the rightful possession of the persons from whom the tax is due, notwithstanding the existence of any lien upon the same; and may proceed to sell the title of such person in so much thereof as will pay the tax due and all costs, in the mode prescribed by law." (Ky. Stats., Sec. 4148.)
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> "If there be no personal property that the sheriff or tax collector can distrain for taxes due, and the same shall not be paid by the first day of July, the sheriff or tax collector shall sell for cash any real estate belonging to or listed by such delinquent taxpayer, or so much thereof as will pay the taxes due and his commission." (Ky. Stats., Sec. 4151.)

The mode of collecting the tax by levy on all the taxpayer's property subject to the tax is, therefore, the usual mode in Kentucky and must be in all the States, and its validity can not be affected by the name of the writ or paper under which the officer acts.

The objection, then, is not to the personal judgment or execution of *fieri facias*, for the precise burden imposed by these exists in all tax cases.. The objection, if any, relates to the mode in which that burden was imposed, namely, the assessment and the notice given, or opportunity afforded, to the taxpayer to contest. This subject is fully gone over by Your Honors in Turpin v. Lemon, decided at last term and reported in 187 U. S. 51.

It is there held that in proceedings for condemnation or for the imposition of special taxes, notice to the owner is necessary, but that in the imposition of general taxes notice may, in many causes, be entirely dispensed with.

We conceive that the tax involved in this case is a general tax, levied by a special procedure, but, whichever it be, the

notice afforded the taxpayer was ample. In the first place, the debt was established by suit in regular form, with service of process on the county. In the second place, in imposing the burden on the taxpayer the State assessment was adopted, as required by Section 3 of the Act. Then a publication for more than three weeks was made, as required by Section 5.

Your Honors said in the Turpin case, quoting from former opinions:

> "It is sufficient to observe here that by 'due process' is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment to be sought. . . .
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> "In Bell's Gap R. R. v. Pennsylvania, 134 U. S. 232, it was held that the process of taxation did not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law when it is executed in accordance to customary forms and established usages, or in subordination to the principles which underlie them." (Turpin v. Lemon, 187 U. S. 58–9.)

Again, in Gledden v. Harrington, decided April 6, 1903, and not yet reported, the court said:

> "Although with respect to this class of taxes we have never had occasion to determine exactly what the Fourteenth Amendment required, we have held that the proceedings should be construed with the utmost liberality, and while a notice may be required at some stage of the proceedings, such notice need not be personal but may be given by publication or by posting notices in public places. It can only be said that such notices shall be given as are suitable in a given case, and it is only where the proceedings are arbitrary, oppressive or unjust that they are declared to be not due process of law."

The long-settled mode of assessment in Kentucky requires no notice to the taxpayer, as is indicated by the following sections of the statute:

> "Real estate, or any interest therein, shall be listed in the county or district where situated, against the owner of the first freehold estate therein. If the owner fails to list the same, the assessor shall, nevertheless, list all lands in his county; and to enable him to ascertain the person in whose name to make the list, he is empowered to swear witnesses, and their statements must be put in writing and returned with the tax-book, and a note or reference made to the proof in the listing of the land. (Ky. Stats., Sec. 4049.)
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> "Any person or corporation claiming to be erroneously charged with any tax upon property not owned by them, may, at any time not later than the next regular county court after they have received notice of the same, by demand being made upon them to pay the tax, offer evidence in support of said complaint to the county court of the county in which the assessment was made; and if said court, after due consideration of the evidence, finds that they were not the owners of the property assessed, it may correct the same by releasing them from the payment of the tax thereon; and it shall be the duty of the court to have the property immediately listed as against the rightful owner thereof. County courts shall have further authority, after giving further notice to the Sheriff and Assessor, to correct any mere clerical errors in the assessment, and any correction made without such notice shall be void. The right of appeal from the decision of the court as herein provided shall apply to all final orders of court made under this section; and it shall be the duty of said court to certify its action to the Auditor of Public Accounts and sheriff, as provided in said preceding section." (Ky. Statutes, Sec. 4250.)

It must be presumed that these provisions of the law were complied with by the State officers before the matter got into the Federal court, and after it got there another opportunity for correcting errors was afforded by the filing of the Commissioner's Report, the advertisement of it for three weeks and by the additional thirty days' time allowed for exceptions by Section 5 of the statute.

This is not only "*due* process of law," but "good measure, pressed down, and shaken together, and running over."

X.

That Hubbert was not the real owner of the bonds.

Surely this matter is concluded by the judgment against the county. It is well settled that judgments against corporations, both private and public, are conclusive upon their members or stockholders.

> "There is no reason why the members of a corporation should be allowed to contest a creditor's claim twice, once in the suit against the corporation through the corporate agents, and again in the suit brought to charge them individually." (Morawetz on Corporations, Sec. 619; see also Angell & Ames, Sec. 629.)

XI.

That the Act of 1882 is contrary to the provisions of Sections 27 and 28 of the Kentucky Constitution, distributing the power of government into three branches.

Respondent relies on an extract from the opinion of the Kentucky court in Pennington v. Woolfolk, 79 Ky. 16, to the effect that

> "the power to impose taxes is legislative and can not be conferred under our Constitution upon a strictly judicial tribunal or officer."

The act under consideration in that case conferred upon the county court the general power of assessing delinquent taxes, and its constitutionality was upheld on the ground that the county court was not a "strictly judicial tribunal."

It has never been held in Kentucky that such powers may not be conferred on circuit courts. The subsequent cases merely follow the decision of this court in Thompson v. Allen County by holding that in the absence of legislative authority

such courts can not under their general equity powers levy or collect taxes.

McLean County v. Brent, 81 Ky. 254.

Baldwin v. Hewitt, 88 Ky. 673.

Grand Rapids Co. v. Trustees, 102 Ky. 556.

The imposition or levy of the tax upon the taxpayers as a body is in its nature an exercise of the law-making power, which the legislature doubtless can not delegate to the courts. But has that been done in this case?

Section 2 of the Act of 1882 provides that if any judgment is rendered or any bond issued under the Act to which it is an amendment,

> "Such judgment shall constitute a lien upon all real and personal property in said county subject to taxation under the revenue laws of this Commonwealth."

This made the debt of the county the debt of its individual citizens, as was held in Supervisors of Lee County v. Rogers, 7 Wallace, 175, where the court said of a statute similar to the one here involved,

> "This section is but a modification of the law of England and of the New England States, which provides for the execution of a judgment recovered against a county, city or town against the private property of any individual inhabitant, giving him the right to claim contribution from the rest of the people."

Such statutes make the public debt a debt of all the citizens, and thereby constitute a legislative levy, as was said by the District Court in Stansell v. Levee Board, 13 Federal Reporter, 851.

> "The order of the court does not undertake to levy the tax or to change (charge?) it. The levy was made by the legislature in the act of incorporation."

Statutes imposing personal liability on citizens for the debts of municipal corporations are elaborately discussed and upheld by the Maine court in Eames v. Savage, 77 Me. 212, and 52

Am. Reports, 751. It is there shown that such a liability is the rule without a statute in England and New England, and that the constitutionality of a statute imposing it can not be doubted. It is analogous to the personal liability imposed upon the stockholders of a private corporation, and in both cases the judgment against the corporation is conclusive as to the debt upon the shareholder or citizen.

Morawetz on Corporations, Sec. 618–619.

Angell & Ames, Sec. 629.

That the enforcement of municipal debts directly against the taxpayer is a common practice in this country is shown by the following extract from the opinion in U. S. v. Johnson, 6 Wall. 6 :

> "Remedies on judgments against municipal corporations partook of the same diversity in the different districts as that appearing in the modes of process to enforce judgments recovered against private persons. Judgment against such a corporation might be enforced in one district by levying the execution, as issued against the corporation, upon the private property, personal or real, of any inhabitant of the municipality, while in another the appropriate remedy, in case the execution against the corporation was returned *nulla bona*, was *mandamus* to compel the proper officers of the corporation to assess a tax for the payment of the judgment."

Upon what ground then can it be doubted that the legislature of Kentucky had power to make the citizens of Taylor County liable for judgments rendered upon its bonds, and to provide for the enforcement of this liability by proceedings in court ?

XII.

That a motion to set aside a void judgment is proper procedure.

This we do not dispute.

Respectfully submitted by

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For Petitioner.